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O N A P P E A L  
FROM THE COURT OF APPEAL OF JAMAICA

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B E T W E E N :

AUBYN McBEAN

Appellant

- and -

THE QUEEN

Respondent

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CASE FOR THE APPELLANT

RECORD

pp.22-44

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1. This is an Appeal by Special Leave from a Judgment of the Court of Appeal of Jamaica (Fox, J.A., Edun, J.A., and Hercules, J.A.,) dated the 4th day of April, 1974, which dismissed the Appellant's appeal and upheld his convictions on charges of unlawful possession of firearm and ammunition under the Firearms Act and his sentence of twelve months imprisonment with hard labour on the said convictions.

2. The Appellant was charged as follows :-

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(a) that he on Monday the 20th day of November, 1972, being in possession of a firearm namely one 6.35 semi-automatic pistol serial No. 674917 except under and in accordance with the terms and conditions of the Firearms Users Licence contrary to Section 20(1)(b) and Section 20(4)(c) of the Firearms Act, No.1 of 1967; and

p.2

(b) that he on Monday the 20th day of November 1972, being in possession of six rounds of ammunition except under and in accordance with the terms and conditions of the Firearms Users Licence

p.1

unlawfully did contravene the terms of Section 20(1)(b) of the Firearms Act, No.1 of 1967 as extended by Section 20(4)(c) (i) of the Firearms Act, No.1 of 1967.

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3. On the 26th June 1973, the Appellant was found guilty of the said offences and sentenced by the Resident Magistrate for the Parish of St. James to be imprisoned for twelve months at hard labour on each of the said charges. The Resident Magistrate also declared the Appellant to be a Restricted Person under Section 3 of the Firearms Act.

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4. The relevant facts appear from the judgment of Mr. Justice Fox of the Court of Appeal, Jamaica, and may be summarised as follows :-

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(a) On the 20th November, 1972, the Appellant was asleep in a room in premises situated at John's Hall in the Parish of St. James, in Jamaica in which room there were also present two other persons. The Appellant was awoken from a deep sleep and on him was found a pistol loaded with six rounds of ammunition;

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(b) On being awoken it is alleged that the Appellant told Detective Inspector Levy, "Mr. Levy, take it easy - you are my friend and people in Montego Bay even say that I am your informant";

(c) The Appellant was charged as appears in paragraph 2 above;

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p.4

(d) When the matter came up for trial on the 15th day of January, 1973, (having been adjourned twice previously) Counsel on behalf of the Appellant took objection in open court to His Honour Mr. Boyd Carey adjudicating on the matter on the grounds that from his instructions there was evidence that reference would be made at the trial to His Honour such as would indicate an interest in the learned Magistrate and/or that His Honour may appear to be a judge in his own cause;

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(e) On the said objection being made, the learned

Resident Magistrate adjourned the trial and hearing of the issue into his Chambers and there dealt with the application in the absence of the Appellant;

- (f) The said objection was refused whereafter the matter was proceeded with on the said 15th day of January, 1973, part heard and further adjourned over to the 29th January, 1973;
- 10 (g) On the hearing of the matter on the said 15th day of January, 1973, there emerged from the evidence, in addition to matters to which reference has been made hereinabove and will hereinafter be made the following fact:
- (i) that Inspector Levy found on the Appellant a 6.35 semi-automatic Berretta pistol Serial Number G74917 (whereas the pistol as referred to in the above recited charge was described as "one semi-automatic pistol" Serial Number 674917.
- 20 (ii) that at the time the Appellant was found on the aforementioned premises at John's Road, he was fast asleep prior to having been awoken and then appeared absolutely exhausted.
- (h) On the adjournment of the matter then part heard on the 15th January, 1973, the Appellant instructed attorneys and application was made successfully to the Supreme Court of Jamaica on the 25th January, 1973, for leave to apply for an Order of Prohibition directed to His Honour Mr. Boyd Carey and a rule in that behalf obtained accordingly pending the determination of that matter;
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- (i) In the event, the hearing of the charge was adjourned on the 29th January, 1973, and from time to time;
- (j) The hearing of the application for the Order of Prohibition was commenced before the Full Court of the Supreme Court of Jamaica and full argument took place over a number of days and there was attendant on the said proceedings wide publicity;
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- (k) While the application for the Order of

p.26  
Cl.35-50

p.27  
Cl.1-8

Prohibition was pending, by Government Notice No.333 dated the 1st of March, 1973, and published in the Jamaica Gazette, His Honour Mr. Boyd Carey was appointed to act as Registrar of the said Supreme Court of Jamaica and so acted during the hearing of the said application;

- (1) The said rule nisi was discharged on the 17th May, 1973, whereupon His Honour Mr. Boyd Carey, whilst continuing to act as such Registrar, on the 14th June, 1973, was temporarily assigned to be a Magistrate of the Resident Magistrate's Court of the Parish of St. James aforesaid "to continue hearing a part heard case" as appears by Government Notice No. 628 published in the Jamaica Gazette; 10
- p.5 (m) On the 26th June, 1973, it was also objected unsuccessfully by Counsel on behalf of the Appellant that it was contrary to law for the said learned Magistrate then having been appointed to act as Registrar of the Supreme Court of Jamaica to be assigned for the purpose of conducting the matter or at all under the provision of the Resident Magistrate Law, Chapter 179 of the Laws of Jamaica which said objection was overruled; 20
- p.6 Cl.13-20 (n) After the close of the case for the prosecution, application, to which objection was made by Counsel for the Appellant, to amend one of the informations No. 7254/72 was granted by the learned Resident Magistrate; and 30
- p.7 (o) As aforementioned the learned Magistrate proceeded to convict and sentence the Appellant and to declare him a Restricted Person under the provisions of the Fire-arms Act, No.1 of 1967 of Jamaica.
- pp.8-11 p.21-22 5. The Appellant appealed to the Court of Appeal on nine grounds which are fully dealt with in the Court of Appeal Judgment. The appeal was dismissed on the 4th April 1974. 40

6. In granting Special Leave to Appeal their Lordships in the Privy Council limited the said leave to the issues raised in paragraphs 4(a) and 4(b) of the Petition, namely :-

pp.44-46

(a) that the procedure of the Resident Magistrate in hearing and adjudicating upon the objection to bias in Chambers and in the absence of the accused was in error and wrong in law, (Ground 9 in the Court of Appeal)

pp.42-44

10 (b) that the Court of Appeal erred in holding that at the time of hearing of the adjourned proceedings on the 26th June, 1973, the learned Resident Magistrate had not ceased to have jurisdiction in the said Parish of St. James such as permitted him to conclude and determine the then part heard matter against the accused (Ground 3 in the Court of Appeal).

p.26 l.35  
p.29 l.5

7. With regard to (a) above, it is respectfully submitted that the trial was a nullity in that

20 (i) part of the proceedings were not held in public contrary to Section 20(3) of the Constitution of Jamaica (Sections 20(3) and 20(4) are reproduced in Appendix A to this Case).

(ii) part of the proceedings were held in the absence of the accused.

It is submitted that the Court of Appeal Judgment on this point is wrong in the following respects :-

30 (i) the Court wrongly sought to restrict the interpretation of the word "proceedings" in Section 20(3) of the Constitution in the light of provisions in the Judicature (Resident Magistrate) Law and Rule 8 Order XI of the Resident Magistrate's Rules;

40 (ii) the Court wrongly held that the Constitution does not require preliminary matters of which an objection on the grounds of bias is such to be held in public on the ground that these are not concerned with the issue of guilt or innocence of the Appellant;

(iii) The court wrongly held that proceedings in a criminal trial only commences when the plea is taken and the objection on the grounds of bias having been taken before the Appellant pleaded could probably have been heard in private and in the absence of the Appellant, not being part of the proceedings

(iv) the Court failed to consider that the only exceptions to S.20(3) of the Constitution are those authorised in S.20(4) *ibid.* It is submitted that none of these exceptions apply in this case and in any event, do not apply (as was done here) to the exclusion of the parties from the proceedings.

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8. With regard to paragraph 6(b) above, it is respectfully submitted that the Court of Appeal wrongly held that the amended Section 192(b) of the Judicature (Resident Magistrate) Law "eliminated the peril which affected the trial of the two cases referred to by Counsel" i.e. Jones -v- Ricketts (1964) 7 W.l.R. 62 and Frederick -v- Chief of Police (1968) 11 W.l.R. 330. The Court of Appeal failed to appreciate that S.192(b) applies to civil and not to criminal proceedings; this, it is submitted is clear, both from the wording of the Section and from the fact that Section 192 is in that part of the Law which deals with "Trial of Causes" i.e. civil causes (Section 192 as originally enacted and as amended is reproduced in Appendix B1 and B2 respectively to this Case).

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9. The Appellant respectfully submits that this Appeal should be allowed with costs, that the judgment of the Court of Appeal be reversed and that the convictions and sentence imposed on the Appellant be quashed for the following reasons amongst others :-

R E A S O N S

1. BECAUSE the hearing and adjudicating upon the objection to bias by the Resident Magistrate in Chambers was in error and wrong in law in that

(a) it was part of the proceedings, but

not held in public within the terms of S.20(3) of the Constitution;

(b) it was held in the absence of the accused.

- 10 2. BECAUSE at the time of hearing of the adjourned proceedings on the 26th June 1973, the learned Resident Magistrate had ceased to have jurisdiction in the said Parish of St. James such as permitted him to conclude and determine the then part heard matter against the accused.
3. BECAUSE the Court of Appeal wrongly held otherwise on these two issues for the reasons given in paragraphs 7 and 8 above.

KARL HUDSON-PHILLIPS

EUGENE COTRAN

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APPENDIX - A

JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962  
Second Schedule - The Constitution of  
Jamaica 1962 S.I. 1962 No. 1550

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- 20 S.20(3) - All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the determination of the decision of the court or other authority, shall be held in public.
- 30 S.20(4) - Nothing in sub-section (3) of this section shall prevent any court or any authority such as is mentioned in that sub-section from excluding from the proceedings persons other than the parties thereto and their legal representatives -
- (a) in interlocutory civil proceedings; or
- (b) in appeal proceedings under any law

relating to income tax; or

(c) to such extent as the court or other authority -

(i) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice; or

(ii) may be empowered or required by law to do so in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of twenty one years or the protection of the private lives of persons concerned in the proceedings. 10

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APPENDIX - B1.

Judicature (Resident Magistrates) Law  
Cap 179

S.192 Whenever a Magistrate shall reserve judgment and shall cease, either temporarily or permanently, to be the Magistrate of the Court in which judgment is reserved, before he has delivered his judgment, it shall be lawful for him, at any time within two months after he so reserved judgment, to lodge with the Clerk of the Court his written judgment on the matter reserved, and such written judgment shall be read in Court by the Magistrate of the Court at the first opportunity after it has been so lodged; and such judgment shall take effect in all respects in the same way that it would have taken effect if the Magistrate who reserved judgment had continued to be the Magistrate of the Court, and had delivered the judgment himself on the day that it was so read as aforesaid. 20 30 40



APPENDIX B2RECORD

as amended by Judicature (Resident Magistrates) (Amendment) Act No.33 of 1966.

S.192 Where a person before whom the hearing of any proceedings has commenced in a Court ceases, either temporarily or permanently, to be the Magistrate of that Court prior to the conclusion of the hearing -

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(a) if he has reserved judgment and ceases as aforesaid before he has delivered his judgment he may at any time lodge with the Clerk of the Court such judgment in writing; and such judgment shall as soon as possible thereafter be read in a Court - by the Magistrate of the Court and shall take effect in all respects as if the person who reserved judgment had continued to be the Magistrate of the Court and had delivered judgment himself on the day that it was so read; or

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(b) he may, whether or not he has reserved judgment as aforesaid, be assigned at any time to be a Magistrate of the Court for the purpose of concluding such hearing."

No. 3 of 1975

IN THE PRIVY COUNCIL

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JAMAICA

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B E T W E E N:

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- and -

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CASE FOR THE APPELLANT

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